YAP FOOK CHEONG & ANOR.

v.

BURKILL (M) SDN. BHD. & ANOR.

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[SC CIVIL APPEAL NO. 02-368-1990]
5 JULY 1991

CIVIL PROCEDURE: *Winding-up order - Application to strike out - In chambers - Certification that no further argument in open Court required - Appeal to Supreme Court - Need to obtain leave - Amount and value of subject matter - Locus standi of appellant - Absence of appeal against winding up order - Correct procedure - Courts of Judicature Act 1964, ss. 68(1)(A), (2) - Rules of the High Court 1980, O. 18 r. 19, O. 56 r. 2(2).*

The 1st respondent, R1, had obtained default judgment for RM67,360.69 against the two appellants who were directors of a company. R1 then successfully applied for a winding-up order in 1986 and the 2nd respondent, R2, was appointed liquidator of the company. The appellants commenced proceedings to challenge the winding-up order.

The application of R1 and R2 to strike out the appellant's statement of claim under O. 18 r. 19 of the Rules of the High Court (RHC) 1980 was refused by the Senior Assistant Registrar. The respondents appealed to the High Court arguing that the appellants had no *locus standi* and raised the issue of jurisdiction as the appellants had not appealed against the order for winding-up.

It was held by the Judge of the High Court, in chambers, that what the appellants were trying to do by writ action was in fact to appeal against the winding-up order, and that this was being done 3 years after the order had been granted, in a Court of co-ordinate jurisdiction which did not have jurisdiction to hear such an appeal, that the appellants were wrong in procedure and had no *locus standi* to do so. His Lordship certified that he did not require any further argument in open Court under s. 68(2) of the Courts of Judicature Act 1964 (the Act). This is the appellants' appeal to the Supreme Court.

The respondents raised a preliminary objection that the appeal should be dismissed because there was no appeal before the Supreme Court as there was no leave obtained under s. 68(1)(a) of the Act. The issue for the Court was whether the appellants should obtain leave under s. 68(1)(a) when the learned Judge had certified that he required no further argument under s. 68(2) of the Act.

Held:

[1] The most correct approach to s. 68 of the Act is to read subsection (1)(a) as the dominant provision as to do otherwise would erode the real object of s. 68(1)(a) which is to prevent cases involving less than RM100,000 being brought to the Supreme Court without leave.

[2] It is wrong to construe s. 68(1)(a) as a general provision and that s. 68(2) deals specifically with matters in chambers; the two provisions should be read together.

[3] The operative words in s. 68(1)(a) are "the **amount** or **value** of the subject matter of the claim". The words "at the trial" which appeared in s. 68(1)(a) before the 1987 amendment

have been left out which restricted the scope to the amount or value of the subject matter **at the trial**. The present s. 68(1)(a) is therefore wider in scope and covers winding-up matters as in this case where the judgment debt which had resulted in the winding-up order is less than RM100,000.

[Preliminary objection upheld; appeal dismissed with costs.]

[**Bahasa Malaysia** Translation of Headnote]

PROSEDUR SIVIL: *Perintah pergulungan - Permohonan pembatalan - Dalam kamar - Pengesahan bahawa hujah dalam Mahkamah terbuka tidak perlu - Rayuan ke Mahkamah Agung - Kebenaran Mahkamah - Nilai pertikaian - Locus standi perayu - Perintah pergulungan tidak dirayu - Prosedur betul - Akta Mahkamah Kehakiman 1964, s. 68(1)(A) & (2) - Kaedah-kaedah Mahkamah Tinggi, A. 18, K. 19, A. 56 K. 2(2).*

Responden pertama, R1, telah memperolehi penghakiman ingkar terhadap kedua-dua perayu untuk jumlah RM67,360.69. Kedua-dua perayu adalah pengarah sebuah syarikat. Pada tahun 1986, R1 berjaya mendapat perintah pergulungan terhadap syarikat tersebut dan responden kedua, R2, dilantik sebagai penyelesai (liquidator). Perayu kemudian memulakan prosiding untuk mempertikaikan perintah pergulungan.

Permohonan R1 dan R2 untuk membatalkan penyata tuntutan di bawah A. 18 k. 19 Kaedah-kaedah Mahkamah Tinggi 1980 ditolak oleh Penolong Kanan Pendaftar. Kedua-dua responden merayu kepada Mahkamah Tinggi atas alasan bahawa perayu tidak mempunyai *locus standi* dan membangkitkan isu bidang kuasa oleh sebab perayu gagal merayu perintah pergulungan.

Hakim perbicaraan telah memutuskan, dalam kamar, bahawa perayu cuba merayu perintah pergulungan dengan menggunakan tindakan writ dan bahawa perayu bertindak demikian 3 tahun selepas perintah tersebut diberi. Tambahan pula, Hakim berkata bahawa adalah jelas bahawa perayu berbuat demikian dalam Mahkamah yang mempunyai bidang kuasa yang saksama yang tidak mempunyai bidang kuasa untuk mendengar rayuan tersebut, dan bahawa perayu tidak mematuhi prosedur yang betul. Mahkamah memutuskan bahawa perayu tidak mempunyai *locus standi* untuk berbuat demikian.

Hakim yang arif juga telah menyarankan bahawa hujah-hujah di Mahkamah terbuka sepertimana yang di peruntukkan dibawah s. 68(2) Akta Mahkamah Kehakiman 1964 (Akta tersebut) tidak perlu. Ini adalah rayuan perayu ke Mahkamah Agung.

Pihak responden telah membangkitkan bantahan awalan (preliminary objection) dan berhujah bahawa rayuan tersebut tidak boleh dihadapkan ke Mahkamah Agung sebelum kebenaran (leave) diperolehi daripada Mahkamah tersebut dibawah s. 68(1)(a) Akta tersebut.

Mahkamah Agung dikehendaki memutuskan sama ada kebenaran diperlukan untuk membuat rayuan ke Mahkamah Agung setelah Hakim Mahkamah Tinggi memutuskan bahawa tidak perlu mendengar hujah-hujah di Mahkamah terbuka sepertimana yang di peruntukkan dibawah s. 68(2) Akta tersebut.

Diputuskan:

[1] Seksyen 68(1)(a) Akta tersebut patut di tafsir sebagai peruntukan utama (dominant). Sekiranya ia tidak ditafsirkan sedemikian, objek utama s. 68(1)(a) tidak akan dicerminkan, iaitu, menegah rayuan tanpa kebenaran kepada Mahkamah Agung, dimana nilai kes yang dituntut tidak melebihi RM100,000.

[2] Seksyen 68(1)(a) tidak boleh di anggap sebagai peruntukan am dan s. 68(2) tidak boleh dihadkan kepada perkara dalam kamar. Sebaliknya, kedua-dua seksyen ini mesti dibaca serentak.

[3] Perkataan penting dalam s. 68(1)(a) adalah "the amount or value of the subject matter of the claim". Pindaan pada tahun 1987 kepada seksyen tersebut yang telah mengeluarkan perkataan "at the trial" dan ini mengakibatkan peruntukan s. 68(1)(a) diluaskan untuk melingkungi perintah pergulungan seperti kedudukan kes ini dimana jumlah penghakiman tidak melebihi RM100,000.

[Bantahan awalan di benarkan; rayuan ditolak dengan kos.]

Cases referred to:
Central Securities (Holdings) Bhd. v. Haron bin Mohd. Zaid [1980] 1 MLJ 305 ***(cons)***
Sinnathamby & Anor. v. Lee Chooi Ying [1987] CLJ (Rep) 336 ***(foll)***
Studham v. Stanbridge [1895] 1 QB 870 ***(foll)***
T.O. Thomas v. K.C.I. Reddy & Anor. [1974] 2 MLJ 87 ***(cons)***
Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor. [1984] 1 CLJ (Rep) 398 ***(cit)***

Legislation referred to:
County Court Rules 1889 [UK], O. L.A r. 12
Courts of Judicature Act 1964, ss. 68(1)(a), (2)
Rules of the High Court 1980, O. 18 r. 19, O. 54 r. 22A, O. 56 r. 2(2)
Rules of the Supreme Court 1980, rr. 49(1), 56

For the appellants - Low Hop Bing; M/s. Low Hop Bing & Associates
For the respondents - Gerard Chan (Voon Ah Kam with him); M/s. Lim Kean Siew & Co.

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

The instant appeal is against the decision of the learned Judge of the High Court (V.C. George J) who allowed an appeal from the decision of the Senior Assistant Registrar refusing to strike out the statement of claim of the appellants pursuant to an application under O. 18 r. 19 of the Rules of the High Court 1980.

The background facts may be briefly stated as follows. The two appellants were directors of a company known as Urachom Foam (M) Sdn. Bhd. (the company) against whom default judgment had been obtained by the first respondent in Civil Suit No. C1802 of 1984 for the sum of RM67,360.69 with interest at the rate of 12% from 1 September 1983 to date of realisation and costs.

The company made an application to set aside the default judgment. The application was dismissed on 14 January 1986. On 6 February 1986 the company made another application for stay of execution of the judgment. That application was also dismissed with costs on 17 April 1986. The first respondent then successfully applied for a winding-up order and by order dated 8 September 1986 in Kuala Lumpur High Court Companies Winding Up No. 204 of 1985 the second respondent was appointed liquidator.

On 8 August 1989 the appellants took out a writ and in the statement of claim sought to challenge the winding-up order. The grounds were mainly on procedural matters. The statement of claim also alleged that the first respondent failed to disclose to the Court that there was a counterclaim for RM70,000 by the company against the first respondent.

In the first respondent's application to strike out the statement of claim of the appellants the affidavits supporting the application set out the background facts just referred to. The first respondent sought to strike out the statement of claim on the grounds that it disclosed no reasonable cause of action, was misconceived and was abuse of process of the Court.

At the hearing of the appeal before the learned Judge the respondents raised the question of *locus standi* of the appellants who were directors of the company to seek the reliefs. The respondents also raised the question of jurisdiction in that there had been no appeal against the winding-up order made in 1986.

Counsel for the appellants maintained that they were the major shareholders of the company and were aggrieved by the winding-up order as well as by the conduct of the liquidator and they were seeking to have the winding-up order set aside and for the liquidator to be removed.

In a brief but precise written grounds of decision the learned Judge summed up the issue at p. 43 in the appeal record:

> What the plaintiffs were trying to do by this writ was in effect to appeal against the decision of the winding up by the Court and doing it some 3 years after the order for winding up had been made and in a Court of co-ordinate jurisdiction which has no jurisdiction to hear such an appeal, using the wrong procedures and in any event without the *locus standi* to do so. As such the whole proceedings *ab initio* was misconceived. The writ and statement of claim should have been struck off.

It would appear on the face of it that the appeal was a non-starter. However before we could hear the merits of the appeal the respondents raised a preliminary objection that the appeal should be dismissed *in limine* because there was no appeal before this Court as there was no leave obtained under s. 68(1)(a) of the Courts of Judicature Act 1964 (the Act).

It is common ground that the order appealed against was made in chambers and that the learned Judge had decided that no further argument in open Court was required and accordingly had issued a certificate under O. 56 r. 2(2) of the Rules of the High Court, 1980.

It is contended by the respondents in the preliminary objection that the appeal was not properly brought before this Court on the grounds that notwithstanding that s. 68(2) of the Act had been complied with no leave had been obtained under s. 68(1)(a) of the Act.

Section 68(1)(a) of the Act states:

> 68(1) No appeal shall be brought to the Supreme Court in any of the following cases:
>
> (a) when the amount or value of the subject matter of the claim (exclusive of interest) is less than one hundred thousand ringgit, except with the leave of the Supreme Court or a Judge of the High Court.

Section 68(2) of the Act states:

> 68(2) No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

The issue in this appeal is simply whether the appellants need to obtain leave under s. 68(1)(a) when the learned Judge had certified that he required no further argument under s. 68(2).

It is the contention of the appellants that in the absence of express words subjecting s. 68(2) to s. 68(1) the specific and express provision of s. 68(2) should apply to the exclusion of s. 68(1)(a) in so far where an appeal is brought against an order made by a Judge of the High Court - in - chambers. In *T.O. Thomas v. K.C.I. Reddy & Anor*. [1974] 2 MLJ 87 the High Court Judge heard the application in chambers and made an order in terms of the application of the first defendant. The plaintiff requested the learned Judge to have the matter

argued further in open Court. This was done and after hearing prolonged arguments and an adjournment for consideration, the learned Judge affirmed the order which he had made in chambers.

The plaintiff appealed against this order to the Federal Court. At the outset of the hearing the first defendant by notice of motion applied that the appeal be dismissed upon the ground that it was incompetently brought as no leave had been obtained under s. 68(2) of the Act.

After considering O. 54 r. 22A of the Rules of the Supreme Court 1957 and the old s. 68(2) of the Act which states that:

> No appeal shall lie from an interlocutory order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of such order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Federal Court or from a Judge of the High Court.

Gill CJ expressed his view at p. 91 that:

> It is to be observed that on an application made to him under O. 54 r. 22A by any party dissatisfied with an order made in Chambers, the Judge has two courses open to him. He may either adjourn the matter into Court and hear further argument, or he may certify in writing that he requires no further argument. If he adopts the latter course and issues a certificate, there is a right of appeal without leave by reason of the specific provision to that effect in subsection (2) of s. 68 of the Act.

The right of appeal without leave there referred to leave under s. 68(2) of the Act.

Section 68 of the Act, as the marginal note states, deals with "non-appealable matters". This means that s. 68 prescribes what are the matters which may not be brought before the Supreme Court. Section 68(1)(a) of the Act speaks of "amount of the claim" and "value of the subject matter of the claim". No appeal may be brought to the Supreme Court when the amount of the claim is less than RM100,000 or when the value of the subject matter of the claim is less than RM100,000 except with leave. The provision is an absolute embargo.

The most correct approach to s. 68 of the Act is to read subsection (1)(a) as the dominant provision. To do otherwise would erode the real object of s. 68(1)(a) which is to prevent cases involving less than RM100,000 be brought to the Supreme Court without leave.

Cases like *T.O. Thomas v. K.C.I. Reddy & Anor. (supra)* and *Central Securities (Holdings) Bhd. v. Haron bin Mohd. Zaid* [1980] 1 MLJ 305 dealt only with s. 68(2) of the Act. In *Central Securities (Holdings) Bhd. v. Haron bin Mohd. Zaid,* Chang Min Tat, FJ dealt with the requirement of s. 68(2) of the Act:

> Leave from Federal Court or from a Judge of the High Court is not a *sine qua non,* without which an appeal cannot proceed, if an application has been made for further argument within four days and the Judge has certified, after application that he requires no further argument. Leave is only required if no application has been made and no certificate has been issued.

Again, the leave referred to is leave under s. 68(2) of the Act.

In *Sinnathamby & Anor. v. Lee Chooi Ying* [1987] CLJ (Rep) 336 the learned Judge in the High Court after hearing a preliminary objection by the respondent in open Court, ordered that the writ of summons and statements of claim of the appellants be struck out and judgment be entered in the respondent's favour against the appellants on the counter claim. The said order was made pursuant to the respondent's summons in chambers, which was directed to be heard in open Court. As the amount or value of the subject matter at the trial was less

than RM100,000 the appeal could only be brought with leave of the Supreme Court or a Judge of the High Court. Leave to appeal was obtained by the appellants from the Judge of the High Court but owing to a misunderstanding of the rules applicable the notice of appeal was filed out of time.

Azmi SCJ on behalf of this Court among other things dealt with the question of notice of appeal filed before leave was obtained and when referring to s. 68(1)(a) of the Act and r. 49(1) of the Rules of the Supreme Court 1980 said:

> But s. 68(1)(a) provides that, "No appeal shall be brought to the Supreme Court" when the amount or value of the subject matter at the trial is less than RM100,000 except with leave of the Supreme Court or a Judge of the High Court. Reading these two provisions together, it is explicit that leave to appeal must first be obtained before notice of appeal can validly be filed and served, although the time limited for appeal would run from the various events specified in r. 56 RSC. (See *Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor.* [1984] 1 CLJ (Rep) 398).

It is implicit in the judgment in its that leave under s. 68(1) was required.

It is wrong to construe s. 68(1)(a) as a general provision and that s. 68(2) deals specifically with matters in chambers. The two provisions should be read together.

The operative words in s. 68(1)(a) are "the **amount** or **value** of the subject matter of the claim". The words "at the trial" which appeared in s. 68(1)(a) before the amendment in 1987 have been left out which restricted the scope to the amount or value of the subject matter **at the trial**. The present s. 68(1)(a) is wider in scope and covers winding-up matters as in this case where the judgment debt which had brought the winding-up order is less than RM100,000. The term "subject matter" was dealt with in *Studham v. Stanbridge* [1895] 1 QB 870 which was an interpleader proceeding. Cave J said:

> The point raised is as to the meaning of Order L.A, r. 12, of the County Court Rules 1889. The higher scale of costs in force in the county Court is threefold. Col. A applies to cases where the subject-matter or the sum recovered exceeds £10 and does not exceed £20 and Col. B where it exceeds £20 and does not exceed £50, and Col. C, where it exceeds £50. The question here is whether the claimant's costs come under Col. C, as the learned county Court Judge has decided, or whether they do not. Rule 12 provides that in interpleader proceedings the "subject-matter" shall mean in the case of a claimant (which is this case) "the amount of the value of the goods his claim to which is allowed, plus the amount of the damage (if any) adjudged." Now, here the county Court Judge has found that the amount of the value of the goods the claim to which was allowed was £51, and he has adjudged £10 damages. Col. C therefore applies, because the subject-matter exceeds £50.

It is clear therefore the Court does not merely look at the relief sought but also considers the value of the judgment if it can be ascertained.

We uphold the preliminary objection and accordingly dismiss the appeal with costs. Deposit to respondents to account of taxed costs.

Also found at [1991] 3 CLJ 1711